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Supreme Court of the United States

OCTOBER TERM, 1971

NO. 70-97

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

RICHARD NEMITZ, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Preliminary Statement

Respondents' basic purpose in this litigation is to impose upon the judiciary the function of interpreting collective bargaining agreements and supervising the efforts and results of the parties to the collective bargaining process. The effort is made in this case for the purpose of establishing, through judicial intervention, an interpretation of such agreements which is contrary to the interpretation arrived at by the parties who negotiated and executed them. After a most exhaustive and complete investigation of the claims which respondents asserted below and reiterate here, the Brotherhood of Railroad Trainmen decided that the collective bargaining agreements at issue were not subject to

the interpretation urged by the respondents (A. (I) 147-50).* Accordingly, the Brotherhood of Railroad Trainmen, as the collective bargaining representative of respondents, ruled that there was no issue between it and the N & W with respect to the meaning of the agreements and that there was thus no reason to invoke arbitration (A. (I) 147-50). It is in the context of this prior determination by the Brotherhood of Railroad Trainmen, a determination which was made on the basis of a full and complete consideration of the issues, that the present effort of respondents to expand the traditional and appropriate function of the judiciary must be appraised.

The brief for the United States and the Interstate Commerce Commission herein emphasizes the fundamental error of respondents' position and the decisions below, stating (p. 12):

> "The decision of the court of appeals would require the Commission to intrude on the collective bargaining process by altering the terms of previously negotiated agreements. The result would necessarily be to discourage settlement of these matters in the future through negotiation, and thus would contravene the strong congressional policy in favor of having labor differences settled through collective bargaining rather than having agencies or courts impose settlements on labor and management."

Despite the importance and complexity of the questions presented, respondents' brief is devoted in large part to matters which are irrelevant to the issues before this Court and to contentions, factual in nature, which are contrary to the record. In this category are (1) the contention that

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* References in this form are to the printed appendix in this Court. The parenthetical numeral indicates the volume of the appendix in which the material referred to may be found.

respondents' interpretation of the 1962 Agreement is the only reasonable one; (2) the claim that Implementing Agreement 1-A was a temporary agreement not intended to fix a permanent formula for calculating respondents' protective benefits; (3) the related contention that the Letter of Understanding of October 25, 1965 expresses a view of respondents' protective benefit rights consistent with respondents' interpretation of the 1962 Agreement; and (4) the attempt to show that the decision of the BRT's National Board of Appeals was consistent with respondents' interpretation of the 1962 Agreement.

The decisions below are not based on a resolution of these factual issues in favor of respondents. The judgment appealed from resulted not from a trial but from the denial of two motions for summary judgment filed by N & W and the granting of a motion for summary judgment filed by respondents. In order to resolve the controversy at the motion stage, the courts below were required to and did assume that N & W's position with regard to these factual questions was correct. Thus, the decisions below can only be affirmed if this Court holds, as did the lower courts, that the Commission and the judiciary may appropriately construe and invalidate collective agreements entered into in good faith by the N & W and the authorized collective bargaining representatives of its employees and may appropriately ignore the good faith outcome of the grievance procedure created by the agreements.

While these matters are not relevant to the questions presented by this case, respondents' discussion of them is obviously designed to frustrate objective consideration of the important issues presented. We believe it necessary, therefore, to correct certain major misrepresentations contained in respondents' presentation.

ARGUMENT

I. RESPONDENTS' CONTENTIONS REGARDING THE INTERPRETATION OF THE 1962 AGREEMENT, IMPLEMENTING AGREEMENT 1-A, THE 1965 LETTER OF UNDERSTANDING, AND THE DECISION OF THE BRT NATIONAL BOARD OF APPEALS ARE UNSUPPORTED BY THE RECORD IN THIS CASE.

The recurring position taken by respondents is that their interpretation of Section 3 of the 1962 Agreement is the only possible one and that any contrary opinion is necessarily arbitrary. Respondents' entire position in this regard is based on the following phrase:

> "None of such employees shall be deprived of employment or placed in a worse position with respect to compensation at any time during such employment except that Norfolk & Western shall not be required to provide employment to any such employee during any year, commencing on the effective date of said acquisition, of greater duration than such employee enjoyed on said line in the twelve months' period immediately preceding the effective date of said acquisition." (A. (I) 67).

Respondents' view is that the first portion of this phrase guarantees two distinct types of protection and that the second part limits only one of these types of protection, leaving the other unaffected. Respondents necessarily assume that the word "employment" is used in the limitation portion of the protective phrase to refer only to the employees "right" to perform services and is not used, as it is most commonly, to comprehend the entire employment relationship, including both the performance of service and the payment of compensation. When the nature of the protection provided by the 1962 Agreement is considered, it is clear that repondents' basic assumption is erroneous.

The protection provided by the 1962 Agreement differed significantly from that contemplated by Section 5(2)(f) of the Interstate Commerce Act which is, essentially, a guarantee of monetary payments whose size and duration are determined by the employees' previous earnings. The parties to the 1962 Agreement were providing, instead, a guarantee of continued employment as that term is ordinarily used. It was contemplated, that is, that the employees would continue to work and earn compensation after the merger just as they did before. To accomplish this purpose, the agreement recited that the employees would not be deprived of employment or placed in a worse position with respect to compensation. This dual phraseology was necessary not because an employment guarantee would not include a compensation guarantee but because the word "employment" as used in Section 5(2)(f) had been held to refer only to compensation (*Brotherhood of Maintenance of Way Employes* v. *ICC*, 366 U.S. 169 (1961)). Thus, in order to insure that the agreement was interpreted as providing employment protection rather than a guarantee limited to monetary payments, the parties utilized the dual phrase which appears in the agreement.*

The parties, having utilized the dual phraseology to make it clear that they intended to provide true employment protection, reverted in the limiting clause to the utilization of the word employment in its ordinary sense to denote the

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* This phrase originally appeared in the Emergency Railroad Transportation Act. In *Brotherhood of Maintenance of Way Employes* v. *ICC*, 366 U.S. 169 (1961), this Court referred to the phrase as providing true employment protection. In describing the protection afforded by the 1962 agreement through utilization of the dual language, the Interstate Commerce Commission Examiner referred to that language as meaning that "employees would not be adversely affected in their employment", obviously using the word employment in its ordinary sense. (324 Ill. 89)

entire employment relationship. Thus, the parties, satisfied that they had provided for maintenance of the full employment relationship, proceeded to limit this protection for employees covered by Section 3 to the employment previously enjoyed by each individual on the Sandusky Line. In effect, the parties stated that employees covered by Section 3, who chose to continue work on the Sandusky Line by electing employment with the N & W, would be no worse off with regard to their employment *on the Sandusky Line* in the future than they had been in the past.

This is the most logical interpretation of Section 3 of the 1962 Agreement, taking into account the entire agreement, the history of merger protection in the railroad industry, and the circumstances of the transaction involved. Moreover, there can be no question that this interpretation is the only one in accord with the intention of the parties and their practical application of the agreement.

The letter written by H. C. Wyatt, Vice President of the Norfolk & Western, to F. D. Montgomery, Vice President of the BRT, summarizing the discussion of the 1962 Agreement which took place at the time the BRT signed it, illustrates the understanding of the parties in this regard. This letter was written April 23, 1962, the same day the agreement was signed by the BRT. It states (A. (I) 94-95):

> ". . . Mr. Noell and I outlined to you and Mr. King our intentions with respect to PRR employees of your representation involved in our purchase of the so-called Sandusky Line. . . .
>
> "At a reasonable time prior to the effective date of the merger, PRR employees working or having seniority on the Sandusky Line would be given the election of severing their relationship with the PRR and establishing employment rights on the new Sandusky District or exercising their seniority on other districts of the PRR.
>
> "The protection afforded these employees of the PRR

would be in direct ratio to service *on the district* in the previous 12 months" (emphasis added).

No reply disputing this summary was ever received by the N & W, and this letter was part of the record on which the BRT Board of Appeals held that respondents' interpretation of the agreement was without merit. Thus, on the very day on which the agreement was signed, Mr. Wyatt confirmed the understanding of the parties that the protection provided by Section 3 (both job and compensation) was limited by the employee's service (duration of employment) on the Sandusky Line in the year prior to the merger.

N & W's interpretation of Section 3 is confirmed by the language of that section dealing with the protection to be afforded Pennsylvania employees displaced by an employee with service on the Sandusky Line who elected not to accept employment with the N & W. Respondents acknowledge that the compensation protection afforded to a displaced employee was limited to the Sandusky Line earnings of the displacing employee. Respondents state that this limitation was necessary to discourage those who worked primarily on portions of the Toledo Division other than the Sandusky Line from electing employment with the N & W and that the recognition of this fact is "critically important to understanding the events which gave rise to the dispute" (Respondents' Brief, p. 8). Respondents' recognition of this "critically important" fact is somewhat belated since they argued in the courts below that under Section 3 displaced employees were clearly entitled to protection based on the compensation of the displacing employee over the entire Toledo Division.*

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* The brief which respondents filed with the District Court in March, 1968, in support of their motion for summary judgment contains the following argument with regard to the protection provided displaced employees by Section 3:

"What is significant about these provisions, however, is that

Respondents' most recent position with regard to the protection afforded these displaced employees is clearly the correct one. The only reason for basing a displaced employee's protection on the earnings of the employee who displaces him, rather than on his own earnings, is to insure that the protection afforded can be related to work performed and compensation earned on the Sandusky Line. If the object was simply to protect the displaced employee from the adverse effects of the merger, the displaced employee's own earnings would be controlling.

The inescapable conclusion from respondents' current position with regard to displaced employees is that the protection afforded respondents by Section 3 is also limited to their earnings on the Sandusky Line. The language of Section 3, referring to the protection afforded displaced employees, indicates that their compensation protection will be determined by the earnings of the displacing employee but does not indicate that only the displacing employee's earnings on the Sandusky Line will be utilized. It is only possible to conclude that the displaced employee's protection is limited to the displacing employee's earnings on the Sandusky Line if it is also concluded that the displacing employee himself would, under Section 3, be entitled to only

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nowhere do they provide that the protective benefits of the displaced Toledo employee will be limited to *the Sandusky Line earnings only* of the displacing employee during the twelve-month-pre-acquisition period referred to. The language simply limits the displaced employee's protective benefits to no greater amount than was 'paid to the Sandusky Line employee . . . in the twelve-month period immediately preceding the effective date of said acquisition.' Since all the Sandusky Line employees enjoyed rights throughout the entire Toledo Division, there is no reason to infer from the Section 3 language that the twelve months earnings of the displacing employee, to be used to put a ceiling on these protective benefits, would necessarily have to be limited to Sandusky Line earnings." (p. 23)

this level of protection. Since the displaced employee is guaranteed "all the protective benefits of this section", it must be concluded that Section 3 provides a guarantee limited to Sandusky Line compensation in order to reach the further conclusion that only the displacing employee's Sandusky Line earnings need be considered. In short, the only possible method of construing Section 3 to limit displaced employees' compensation protection to Sandusky Line earnings is to conclude that all compensation protection afforded by Section 3 is limited to Sandusky Line earnings.

Respondents' admission that it was necessary for the parties to discourage employees, whose primary work connections were with portions of the Toledo Division other than the Sandusky Line, from electing employment with the N & W also demonstrates that Section 3 must be interpreted to limit compensation protection to Sandusky Line earnings for all Toledo Division employees. If an employee who engaged in any work on the Sandusky Line could elect employment with the N & W with a guarantee based on his full compensation over the entire Toledo Division, many employees who worked only briefly on the Sandusky Line, and whose primary employment connection was, therefore, not with the Sandusky Line, would have been encouraged to accept employment with the N & W. Moreover, the only reason for discouraging employees from electing employment on the Sandusky Line was to prevent unneeded employees from electing employment with the N & W. A limitation of the protective benefits only for displaced employees would not have accomplished this purpose. The employees involved preferred to work at Sandusky and a guarantee of full compensation to all employees with previous Sandusky service would have insured that all those eligible would elect employment with the N & W. In that event, no displacement of employees would occur on other portions of the Toledo Division. Moreover, limitation of the protection afforded displaced employees would not discourage them

from electing employment with the N & W since such employees, having been displaced, would have no realistic alternative.*

The Letter of Understanding, Implementing Agreement 1-A, and the decision of the BRT Board of Appeals also support N & W's interpretation of Section 3. The Letter of Understanding stated that 75% of each employee's total earnings on the entire Toledo Division would be used as the basis for making temporary benefit payments until a breakdown between compensation earned on the Sandusky Line and other Toledo Division compensation could be obtained. (A. (I) 89-91). This letter, signed by representatives of both the N & W and BRT, is consistent only with the view that the protective benefits for the employees involved were based on their earnings on the Sandusky Line in the 12-month period immediately preceding the merger. If this were not true, no need for a temporary arrangement would exist since, as the letter states, the N & W was already in possession of the total Toledo Division earnings of each employee.

Implementing Agreement 1-A, entered into simultaneously with the Letter of Understanding, provided a

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* Respondents attempt to draw a distinction between "Sandusky Line employees" and "former Pennsy employees whose employment connection was not with the Sandusky Line" (Respondents' Brief, pp. 6-7). Prior to the merger, however, all employees working on the Toledo Division (which included the Sandusky Line) were Pennsylvania employees with the right to work throughout that Division. A single seniority roster was maintained for all such employees and whether a particular employee worked on the Sandusky Line or elsewhere on the Toledo Division was solely a reflection of his personal preference, his seniority standing, and the work available on the various portions of the Division. Respondents abandon this spurious distinction where it suits their purposes and, referring to themselves, state "these trainmen were Pennsy employees" (Respondents' Brief, p. 89).

formula which was to be used to calculate respondents' permanent benefits when Sandusky Line earnings were received from the Pennsylvania. This formula was consistent only with the N & W's view of the meaning of Section 3 (Pet. Brief, p. 13). Implementing Agreement 1-A did not provide for any immediate payments to the employees and met no other temporary need. The only possible reason for its existence was to provide a formula for future use when Sandusky Line earnings were received.

When Sandusky Line earnings were actually received, the BRT and N & W attempted to authenticate figures received and to calculate the actual amounts due. The N & W representative in these discussions testified that in determining the amount of benefit payments to which respondents were entitled, he was guided by the formula in Implementing Agreement 1-A and that on February 20, 1967, the parties agreed on final figures based on the formula in that agreement (Yancey Deposition, pp. 7-8, 13, 20-21, 24-25, 30-31, 49-51).

A careful reading of the decision of the BRT Board of Appeals (A. (I) 113-150), reveals that the Board concluded that the N & W position with regard to the meaning of Section 3 was correct. The Board stated (A. (I) 149):

> "In the instant case there is no . . . disagreement between our Brotherhood and the Norfolk and Western."

The Board thus approved the N & W position with regard to the meaning of Section 3. The N & W position in this regard had been outlined for the Board by T. E. Fitz, respondents' local chairman, as follows (A. (I) 116):

> "The management of the N & W . . . contend they are only obligated to protect these men for monies earned performing service on the 111 miles of road between Columbus and Sandusky and the Sandusky yards, thereby dividing their earnings for the purpose of

establishing a test period. They also contend they are only required to use earnings from October, 1963, until October, 1964."

J. F. McNeel, General Chairman of the BRT and the individual who negotiated Implementing Agreement 1-A for the BRT, successfully opposed Fitz's appeal, urging the correctness of the N & W's interpretation of Section 3 of the agreement. In referring to Section 3, McNeel stated (A. (I) 136-137):

> "From the language in this Agreement, it can be clearly adduced that the trainmen who formerly worked on the Pennsylvania Railroad and exercised their option to transfer to the Norfolk and Western Railway Company are entitled, for the purpose of determining the amount of 'Certified Test Period Earnings,' only to the amount of monies earned on the Sandusky District during the twelve (12) months immediately preceding the effective date of the merger ..."

The BRT Board of Appeals, finding no disagreement between the BRT and the N & W as to the meaning of Section 3 of the 1962 Agreement, thus rejected respondents' interpretation. The representations to the contrary, which appear in respondents' brief in this Court, are clearly incorrect.

II. THE CLAIM THAT A RAILWAY MERGER MAY AFFECT AN EMPLOYEE'S POLITICAL INFLUENCE WITH HIS COLLECTIVE BARGAINING REPRESENTATIVE DOES NOT JUSTIFY THE JUDICIAL INTERVENTION IN THE COLLECTIVE BARGAINING PROCESS WHICH RESPONDENTS SEEK IN THIS PROCEEDING.

Respondents state that the purchase of the Sandusky Line by N & W reduced their political effectiveness within

their union, that other employees involved in rail consolidations may have a similar experience, and that this justifies a statutory interpretation of Section 5(2)(f) severely limiting the authority of unions to enter into binding agreements and grievance settlements in a merger situation. What respondents complain about, however, is not unique to merger situations but is inherent in all collective bargaining.

Both the Railway Labor Act and the Labor Management Relations Act provide that a majority of the interested employees may choose the exclusive bargaining representative of all. This representative then has the authority and responsibility to freely negotiate agreements fixing the terms and conditions of employment for all employees, regardless of their position in the union and even regardless of whether they are members of the union at all (*Steele* v. *L. & N. R. Co.*, 323 U.S. 192 (1944)). In the rail industry, many of those represented have, in fact, been members of rival unions. Congress was, of course, aware of the scope of the authority thus conferred on collective bargaining representatives but concluded that the national interest in stable labor relations and the employees' interest in obtaining a voice in determining the conditions of their employment could be preserved only if the unions were afforded equality of bargaining power by being able to present a united front in negotiations (*Weyand, Majority Rule In Collective Bargaining*, 45 Colum. L. Rev. 556 (1945)). Thus, the mere fact that mergers may lessen the influence of particular groups within bargaining units does not justify a departure from the traditional balance which Congress and this Court have established between individual and collective rights in labor relations.

The balance which has been struck by this Court is reflected by *Steele* v. *L. & N. R. Co.*, 323 U.S. 192 (1944) and *Vaca* v. *Sipes*, 386 U.S. 171 (1967). The *Steele* case out-

lined the sole limitation which has been placed on the union's right to freely negotiate terms and conditions of employment for all whom it represents (323 U.S. at 202-03):

> "We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them. This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented."

Thus, this Court concluded that the only appropriate restraint on the power of the collective bargaining representative to create and restrict the rights of the employees it represents was its duty to refrain from hostile discrimination against any individuals or groups.

Subsequently, this Court applied this principle in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953) and *Humphrey* v. *Moore*, 375 U.S. 335 (1964). In *Ford*, this Court upheld the validity of a "supplementary agreement" which reduced the seniority rights held by certain employees under a previous agreement, stating (345 U.S. at 338):

> "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. Compromises on a temporary basis, with a view to long-range advantages, are natural incidents of negotiation."

In *Humphrey*, this Court upheld the union's action in agreeing to the dovetailing of the seniority rosters of two

motor carriers after they had exchanged certain operating rights. This Court stated (375 U.S. at 349-50):

> ". . . we are not ready to find a breach of the collective bargaining agents' duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents. . . ."

These cases concerned the collective bargaining representatives' right to enter into new agreements. In *Vaca* v. *Sipes,* this Court dealt with the other major area of concern in labor relations, the union's right to bind the employees it represents by its action in handling their grievances. This Court held that an employee was bound by his union's good faith determination that his grievance was without merit and its consequent failure to exhaust a contractually-created arbitration procedure within its exclusive control, even though the employee subsequently convinced a court and jury that his contractual rights had actually been violated. This Court reasoned (386 U.S. at 191-93):

> "If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration."
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> • • •
>
> ". . . if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial."

This Court has thus held that the rights of individual members of a bargaining unit are properly protected from potential abuse by their collective bargaining representative, either in negotiating agreements or resolving grievances, by providing a judicial remedy where the individual can show that union action was taken in bad faith.

This Court has concluded that additional limitations on the authority of the collective bargaining representative would unduly sacrifice the collective rights of the majority and the interests of employers and the public in stable labor relations to the long-range detriment of all parties concerned. The present case provides no reason for departing from these principles. Although respondents' complaints arise out of a railroad merger, the union authority which respondents question is that inherent in the status of the union as the exclusive representative of the entire craft or class. There is no basis for assuming that Congress intended to alter that union authority in merger situations.

III. SECTION 5(2)(f) OF THE INTERSTATE COMMERCE ACT DOES NOT REQUIRE OR PERMIT THE JUDICIAL INTERVENTION IN THE COLLECTIVE BARGAINING PROCESS SOUGHT BY RESPONDENTS.

A. The Literal Language of Section 5(2)(f)

Respondents argue that the Court should interpret Section 5(2)(f) to require that "third sentence agreements comply with the minimum protective standards of the first and second sentences . . . under pain of Commission disapproval of any agreement which falls short of the statutory minimum." (Respondents' Brief, p. 46). This would require the Commission to examine voluntary agreements to determine whether they provide the "fair and equitable arrangement" referred to in the first sentence and at least

the protective benefits described in the second sentence of 5(2)(f). Should the Commission find that these requirements are met, it would be required to order the carrier to comply with the terms of the agreement at the time it approves the merger. Should the Commission conclude that the agreement does not meet these standards, it would be required to substitute its judgment of fair and equitable protective provisions for the results of the collective bargaining process by rejecting the agreement and prescribing different employee protection. Similarly, respondents argue that third sentence agreements made subsequent to the consummation of a merger are invalid if a court retroactively determines that they "abrogate" any rights created by prior agreements or orders (Respondents' Brief, pp. 68-69).

This position finds no support at all in the literal langauge of Section 5(2)(f). If the third sentence of Section 5(2)(f) were removed from that section entirely, no one would suggest that labor and management could not subsequently sign and submit to the Commission a stipulation stating their mutual position as to the protective conditions which the Commission should prescribe. Nor would anyone suggest that labor and management could not, after the merger, enter into agreements which did not abrogate rights created by the order of approval. Respondents' interpretation of Section 5(2)(f), however, would restrict the authority of labor and management with regard to employee protection to the negotiation of stipulations and agreements of this nature and would thus render the last sentence of Section 5(2)(f) absolutely meaningless.

The last sentence of Section 5(2)(f) provides that the parties may enter into agreements relating to employee protection "notwithstanding any other provision of this Act". The only possible reason for inclusion of the quoted phrase

was to insure that nothing in the Act would be construed to limit the right to make such agreements and to require such conflicts, if they arose, to be resolved in favor of the parties' right to agree. The only language in the Interstate Commerce Act which relates in any way to employee protection is the language of Section 5(2)(f) itself and, thus, the only possible source of restrictions on the parties' right to agree on employee protection are the first two sentences of that section. It must be concluded, therefore, that the "notwithstanding" clause of Section 5(2)(f) vitiates any restrictions on the collective bargaining process which might otherwise be inferred from the first two sentences of that section relating to the Commission's authority to prescribe protection. Respondents' position is thus clearly refuted by the literal language of Section 5(2)(f).

B. The Legislative History of Section 5(2)(f)

Respondents argue that N & W's position is contrary to the legislative history of Section 5(2)(f) but fail to cite a single supporting word of legislative history in this connection. Instead, respondents rely on this Court's decisions in *Railway Labor Executives' Assoc.* v. *United States,* 339 U.S. 142 (1950), and *Brotherhood of Maintenance of Way Employes* v. *United States,* 336 U.S. 169 (1961). In both cases, the sole question considered by this Court was the extent of the Commission authority to prescribe protective conditions where the parties had *not* entered into voluntary agreements. Neither decision mentions the third sentence of Section 5(2)(f).

Apparently, respondents consider these decisions relevant because they establish (Respondents' Brief, p. 52):

> ". . . that one of the principal purposes of Section 5(2)(f) 'was to provide mandatory protection for the interests of employees affected by railroad consolida-

> tions,' and that the Commission is 'required to observe the provisions of the second sentence of Section 5(2)(f) as a minimum protection for employees adversely affected'."

Respondents argue that N & W's position is inconsistent with this view of the purpose of the first two sentences of Section 5(2)(f). Respondents assert that under the N & W's interpretation "the railroad and union would [in cases where protective agreements are sought] start from a position which presupposed no obligation to meet any mandatory minimum level of protection" and that N & W's view requires a conclusion that railway labor intended, by the last sentence of Section 5(2)(f), "to weaken its own bargaining position in cases where agreement on protective conditions was sought" (Respondents' Brief, p. 53).

The cases cited by respondents establish that Congress intended, by the first two sentences of Section 5(2)(f), to guarantee that employees were protected in railway consolidations and to require the Commission to prescribe at least certain minimum protection in instances where it had authority to determine what that protection would be. These propositions are in no way inconsistent with N & W's view of the meaning of the last sentence of Section 5(2)(f).

Under N & W's interpretation of Section 5(2)(f), railway labor is guaranteed at least the minimum benefits of Section 5(2)(f) if it is unable, by voluntary agreement, to obtain protection more satisfactory to it. All that labor's representatives are required to do is refuse to enter into such an agreement and the Commission is then required to prescribe at least the protection described in the second sentence of Section 5(2)(f). For this reason, removing the restrictions of the first two sentences in instances in which protective agreements are voluntarily entered into in no way weakens labor's bargaining position. In negotiations

for a voluntary protective agreement, representatives of labor start out with the alternative of Commission-prescribed protection and seek to obtain something preferable through voluntary agreement. It is respondents' interpretation of Section 5(2)(f) which is inconsistent with organized labor's role in drafting that provision. Respondents' view suggests that organized labor, having assured itself of obtaining certain minimum benefits in instances in which management refused to enter into an agreement, also intended to limit its own authority to agree upon other conditions and to subject voluntary agreements to possible invalidation by the Commission which, under respondents' interpretation, would have authority to reduce as well as increase agreed-upon protection.

C. The Administrative Interpretation of Section 5(2)(f)

Respondents also dispute the Interstate Commerce Commission's own representations as to what its interpretation of Section 5(2)(f) is and has been. In so doing, respondents place principal reliance on the Commission decision in *Florida East Coast Ry. Reorganization,* 307 I.C.C. 5 (1958), arguing that this case demonstrates that the Commission "has consistently reviewed pre-merger agreements". The *Florida East Coast Ry.* case, however, involved the Commission's jurisdiction to reorganize a bankrupt railroad under Sec. 205(d) of the Bankruptcy Act (11 USC Sec. 205(d)). The Commission did reject a stipulation of the parties to the bankruptcy proceeding as to provisions for the protection of the bankrupt carrier's employees after the reorganization plan was carried out. It found that the stipulation provided more protection than could be justified under the circumstances and prescribed *reduced* protective benefits in its order approving the reorganization plan. Subsequently, the Railway Labor Execu-

tive Association (RLEA), which at the time represented the vast majority of employees in the railroad industry, petitioned for reconsideration of the Commission's action on the theory that the stipulation constituted an agreement made pursuant to the last sentence of Section 5(2)(f) and that, consequently, the Commission had no authority to review it. The Commission considered and rejected the RLEA's petition in a supplemental opinion reported at 312 I.C.C. 744. It held that its authority under the Bankruptcy Act was broader than that afforded by Section 5 and that, in any event, the stipulation was not an agreement within the contemplation of Section 5(2)(f).

The Commission decision rejecting RLEA's petition was affirmed on the same ground (*In Re Florida East Coast Railway Company*, 171 F. Supp. 512 (S.D. Fla. 1957)). Thus, the only significance the *Florida East Coast Ry.* case has to the present proceeding is that it demonstrates that an association representing the vast majority of railway employees took a position as to the meaning of Section 5(2)(f) identical with N & W's position in this case.

Respondents also quote a paragraph from the Commission's amicus brief in *Clemens* v. *Central R. R. Co. of New Jersey*, 264 F. Supp. 551 (E.D. Pa. 1967), reversed 339 F.2d 825 (3rd Cir. 1968), and argue that the paragraph is inconsistent with the Commission's representations concerning its interpretation of Section 5(2)(f). Respondents, however, fail to quote the immediately following paragraph of that brief which states (A. (I) 175):

> "In more recent cases the Commission has held that, 'as to employees covered by the aforementioned agreements, no conditions to our order are necessary'; and prescribed a set of conditions only for those 'not protected by the foregoing stipulations and agreements.' *Norfolk & W. Ry. Co. Merger*, 307 I.C.C. 401, 439 (1959). Or upon noting that a particular union-carrier

> stipulation was 'of the character contemplated by section 5(2)(f) of the act for the protection of railroad employees who may be adversely affected by the authorized transaction,' the Commission has simply held, 'as to the employees covered by the stipulation, no conditions in our orders are necessary,' and prescribed conditions only to protect 'employees of the applicants [railroads] not covered by the aforesaid stipulation.' *Chicago & N.W. Ry. Co. Purchase,* 312 I.C.C. 285, 296 (1960); and see *Duluth, S.S. & A.R. Co. Merger,* 312 I.C.C. 341, 356 (1960). Thus, even when protective conditions are stipulated during the course of the proceeding, the employees covered by such agreement must claim their benefits under and pursuant to such agreement, and not under or pursuant to the Commission order."

It should further be noted that in that brief the Commission also expressed the view that even in situations where no voluntary agreement is reached prior to a merger and the Commission orders protection, the parties have full authority to change that protection by subsequent agreement (A. (I) 174).

D. The *North Western* case and Section 5(2)(f)

In urging their interpretation of Section 5(2)(f), respondents devote seven pages of their brief to the decision in *Chicago and North Western Ry. Co.* v. *Brotherhood of Locomotive Engineers,* 202 F. Supp. 277 (S.D. Ia. 1962), Aff. 314 F.2d 424 (8th Cir. 1963). Respondents begin this discussion by misrepresenting the North Western's position in that case and arguing that the N & W's position here is inconsistent with the position they erroneously attribute to the North Western.

Respondents state that the *North Western* case demonstrates that (Respondents' Brief, p. 60):

> "Railroad management . . . has not hesitated to urge

upon the courts the conclusion that the commission's duty is to include third sentence 5(2)(f) agreements in its order, so that a union refusal to comply with that agreement can be enjoined as a violation of the Commission's order rather than be dealt with as a dispute under the Railway Labor Act."

The carrier in the *North Western* case, however, did not argue that it was the Commission's duty to include third sentence agreements in its order, was not attempting to enforce either an order or an agreement, and did not seek an injunction.

The *North Western* case arose out of the merger of the North Western with the Minneapolis and St. Louis Railroad. Prior to the merger, the North Western had entered into an agreement concerning employee protection which provided an administrative procedure to adjust employee rights in the event of a post-merger consolidation of facilities. After the Commission approved the merger, the North Western sought to invoke this procedure, but the union refused to participate on the ground that such a consolidation would require changes in employee seniority rights created by other agreements and that Section 6 of the Railway Labor Act provided the only method by which such changes could be accomplished.

North Western then filed an action seeking a declaratory judgment. The North Western argument, adopted by the Court, was that Section 5(11) of the Interstate Commerce Act relieved the parties of the restrictions of other laws in accomplishing a merger approved by the Commission and, consequently, the procedures of the agreement prevailed over any contrary provision of the Railway Labor Act. Whether the Commission had ordered the parties to comply with the provisions of the agreement was irrelevant to the resolution of this issue. The significant fact was that the

Commission had approved the merger plan, and the protective agreement was part of that plan. Thus, under the literal language of Section 5(11), the requirements of the Railway Labor Act could not be imposed to prevent the accomplishment of the merger in accordance with the approved plan.

N & W's position is obviously not inconsistent with the position of the North Western or the Court's holding in the *North Western* case since N & W is not arguing here that the provisions of the Railway Labor Act should be applied to prevent the accomplishment of an authorized merger. N & W seeks here only a holding which would make the protective agreements it has entered into with respondents, including the provision of those agreements creating a procedure for resolving disputes concerning their meaning, binding upon the parties. In doing so, N & W is not asserting rights based on other federal laws but, instead, asserting its right, under Section 5(2)(f) of the Interstate Commerce Act, to enter into voluntary agreements.

N & W's only reliance on the Railway Labor Act is its assertion that, should this Court consider the arbitration provision of the agreement inappropriate for any reason, the parties would then be remitted to the exclusive jurisdiction of the National Railroad Adjustment Board for the resolution of this dispute. This argument is in no way inconsistent with Section 5(11) since the Railway Labor Act would not be applied to prevent the accomplishment of a Commission-authorized transaction but simply to interpret an agreement.

It is also clear that the question of the applicability of Section 6 procedures to the negotiation of protective agreements is not involved in this case. To the extent that the application of Section 6 of the Railway Labor Act would

be inconsistent within the congressional purpose to permit the carrying out of railway mergers approved by the Commission, those procedures would be rendered inapplicable by Section 5(11), regardless of whether or not the Commission prescribes protective conditions in its order.

E. The Third Sentence of Section 5(2)(f) As An Independent Source Of Judicial Jurisdiction

Respondents' final argument with regard to the Interstate Commerce Act is that even if the Court holds that the first two sentences of Section 5(2)(f) do not limit the right to agree, preserved by the third sentence, federal jurisdiction of this action is still sustainable on the theory that Implementing Agreement 1-A violates the third sentence of Section 5(2)(f). Respondents' argument that Implementing Agreement 1-A violates the third sentence of Section 5(2)(f) is based on the contention that the agreement does not pertain to employee protection because it would provide lower benefit payments than would be payable under the 1962 Agreement, as interpreted by respondents.

This argument is patently frivolous. It is difficult to understand how an agreement which fixes a formula for calculating the protective benefits payable to employees can be said not to pertain to employee protection. Even if such an argument could be made it is dependent on the conclusion that the 1962 Agreement means what respondents say it means. Absent a determination that the Commission ordered the parties to obey the terms of the 1962 Agreement, however, the federal courts clearly would be without jurisdiction to resolve this preliminary question.

In any event, an action for violation of the third sentence of Section 5(2)(f) could be justified only by concluding that that sentence prohibits agreements which do not fall within its scope. Thus, in order to accept respondents' contention,

the Court would be required to hold that labor and management cannot make agreements which do not pertain to employee protection. Such a suggestion is obviously incorrect. Under the Railway Labor Act, labor and management may agree on any subject affecting the terms and conditions of employment in the railroad industry, including employee protection. The only limitation on this right is the duty of the union to refrain from engaging in hostile discrimination against any of the represented class. Even a perfunctory glance at the language and history of the third sentence of Section 5(2)(f) demonstrates that it was not intended to either expand or limit this right, but only to prevent other provisions of the Interstate Commerce Act from imposing limitations upon it. That sentence cannot be the basis of an action to invalidate a collective bargaining agreement since its language does not prohibit agreements of any kind.

IV. THE COMMISSION'S ORDER APPROVING THE PURCHASE OF THE SANDUSKY LINE DOES NOT SUPPORT THE LOWER COURTS' ASSUMPTION OF JURISDICTION IN THIS CASE.

Respondents' brief gives only perfunctory attention to the theory, which they successfully urged upon the lower courts, that the Interstate Commerce Commission ordered the parties to the 1962 Agreement to obey its terms and that this action was consequently one to enforce a Commission order. The reason for respondents' reluctance to press this argument is obvious. The Commission expressly stated that it was not imposing protective conditions for the benefit of employees covered by the agreement (324 I.C.C. at 89-90) and spoke only of making the authorization of its order "subject to the agreement" (324 I.C.C. at 50). When it discussed protective provisions for the employees not covered by the 1962 Agreement, however, it concluded that entirely

different conditions, providing substantially less protection, would be fair and equitable and stated that those conditions "would be imposed . . . in our order" (324 I.C.C. at 50). The difference between imposing conditions in an order and making the authorization contained in an order subject to an agreement are obvious and fundamental. When conditions are imposed by an order, a positive duty to fulfill the conditions is created by the order itself. When, however, authorizations are made "subject" to an existing agreement, the purpose is to prevent the authorization from being interposed to change or nullify the provisions of the agreement. The source of any positive rights relating to the subject matter of the agreement in such a situation, however, is the agreement and not the order which is subject to it. The recital that the order is subject to the agreement does not add to or detract from the rights and obligations thus created by the agreement.

Respondents now place principal reliance on the contention that this Court should hold that the 1962 Agreement may be enforced in federal court because it became part of the Commission order as a matter of law even if the Commission actually failed to include it. This argument is obviously an indirect way of urging the Court to simultaneously overturn the Commission's order approving the merger, substitute a new order which the Court feels would be in accord with statutory requirements, and enforce this new order.

This argument overlooks the fact that this action is not a statutory review proceeding, but instead an action seeking enforcement of a Commission order. A Commission order may be set aside only under the procedures outlined in Sections 2321-2325 of the Judicial Code (28 U.S.C. Sections 2321-2325). Such a proceeding must be instituted by a complaint naming the United States as the defendant.

and must be heard by a three judge court.* Since these procedures were not followed in this case, it is obvious that the courts below did not have authority to determine whether the Commission's order complied with the requirements of the Interstate Commerce Act. Moreover, even if the courts below could have considered this question, they could not, upon determining that the order did not comply with the Act, alter that order to conform with their view of the statutory requirements. A holding that the first two sentences of Section 5(2)(f) place limitations on the parties' right to agree on employee protection and that, therefore, the Commission has authority to review and alter voluntary agreements, could only be based on a conclusion that Congress wished the employees to have protection which the Commission determined to be fair and equitable under all the circumstances. Respondents' contentions that the courts should enforce employee protective agreements entered into by the parties in situations where the Commission has failed to exercise its authority in this regard would be inconsistent with such a scheme. Thus, even in a proper review proceeding, a court that determined that

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* Respondents argue that the Court should create a remedy for them out of whole cloth because "cases to review an Interstate Commerce Commission Order . . . must be filed within 90 days after the date the Commission's order becomes final, 28 U.S.C. Section 1336", and in this case "they [were] led to believe for more than 90 days after the Commission's order that they [were] to be fairly and adequately treated." (Respondents' brief, pp. 69-70). The 90 day limitation created by Section 1336, however, applies only to actions to review Commission orders resolving issues referred to the Commission by courts. There is no statute limiting the time for filing an action to set aside an order entered by the Commission in a proceeding, such as the N & W merger proceeding, which was originally initiated before the Commission. The doctrine of laches applies in such cases and would not bar an action which was delayed through no fault of respondents.

the Commission had failed to exercise its statutory authority with regard to employee protection could only remand the proceeding in order to give the Commission an opportunity to exercise its statutory authority. Upon such a remand, the Commission might determine that it could appropriately prescribe the terms of the 1962 Agreement, but it also might determine that either greater or lesser protection was fair and equitable and reject the 1962 Agreement in favor of some other protective plan.

CONCLUSION

For the reasons discussed in the Brief For Petitioner and in this Reply Brief, the decision of the Sixth Circuit Court of Appeals should be reversed and remanded with directions to dismiss for lack of jurisdiction and for failure to exhaust administrative remedies.

Respectfully submitted,

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